LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 2 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962
No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

JOHN H. LAUTEN,
CLAUDE L. ROWE,
910 Security Bank Building,
Fresno 21, California,
Attorneys for Petitioner City of Fresno.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

PAGE

PAGE

TEXTS

WATER RIGHTS BOARD DECISIONS

UNITED STATES DOCUMENTS

PAGE

UNITED STATES STATUTES

IN THE

Supreme Court of the United States

October Term, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

I.

OPINIONS IN THE COURTS BELOW.

Petitioner in this regard refers to the same opinions as it did at pages 2 to 4 inclusive of its opening brief.

II.

JURISDICTION.

The judgment of the court of appeals was entered on March 31, 1961 [R. 393 (new volume)]. The City of Fresno's timely petition for rehearing was denied on August 14, 1961 [R. 396 (new volume)]. On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ

of certiorari to December 12, 1961 [R. 404 (new volume)]. The petition was filed on December 11, 1961, and was granted on April 2, 1962 [R. 405 (new volume)]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

III.

STATUTES INVOLVED.

1. Act of June 17, 1902, 32 Stat. 388, 389-390, Secs. 4 and 8, 43 U. S. C. 391—See Appendix "C" of Petitioner's Opening Brief, pages 4-5.

2. Act of August 4, 1939, 53 Stat. 1187, 1194—See Appendix "C" of Petitioner's Opening Brief, page 14.

3. Appropriation Act for 1949, 62 Stat. 1112.

(Provided further, That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"

4. Act of October 14, 1949, 63 Stat. 852, 853—See Appendix "C" of Petitioner's Opening Brief, page 16.

5. Sections 2(a) and 3(c) of the Act of July 28, 1954, 68 Stat. 577.

"Sec. 2.(s) In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal noninterference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California.

"Sec. 3.(c) For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California: Provided, That nothing in this Act shall be construed as a grant or a relinquishment by the United States of America of any of its right to the use of water which it acquired according to the laws of the State of California either as a result of its acquisition of the lands comprising Camp Joseph H. Pendleton and adjoining naval installations, and the rights to the use of water as a part of said acquisition, or through actual use or prescription or both since the date of that acquisition, if any, or to create any legal obligation to store any water in DeLuz Reservoir, to the use of which it has such rights, or to require the division un-

der this Act of water to which it has such rights."

6. Act of July 2, 1956, 70 Stat. 483, 484—See Appendix "C" of Petitioner's Opening Brief, pages 18-19.

IV.

QUESTIONS PRESENTED.

A. Whether respondents have completely failed to answer the following arguments of petitioner, made in petitioner's opening brief, and whether by reason thereof it may be assumed that respondents no longer contest the same:

1. That the determination of the limits of statutory authority of respondent Bureau of Reclamation officials is a judicial and not an administrative determination.

2. That the determination of whether a rate charged for water to a municipality from a Reclamation Project is reasonable or unreasonable, arbitrary and in excess of the statutory authority of respondent officials is a judicial and not an administrative decision.

3. That by virtue of Rule 40(d)(2) of this Court respondent officials may not bring up new matters not set forth in their petitions for certiorari.

4. That having failed to attack as error in their petition for certiorari the finding of the District Court that any charge to the City of Fresno in excess of $3.50 per acre-foot for Class I irrigation water was unreasonable and illegal, respondents are barred from attacking it under Rule 40(d)(2) of this Court.

5. That respondent officials are required to operate the Central Valley Project in accordance with California county and watershed of origin laws and in accordance with the Act of Congress of October 14, 1949, 63 Stat. 852, 853, requiring respondents to recognize California county and watershed of origin protective laws.

6. That respondent officials are required to operate the Central Valley Project in accordance with California municipal and domestic priority laws.

7. That assuming petitioners were entitled to water from the Central Valley Project the determination of the amount of water to which a riparian overlying owner is entitled is a judicial and not administrative decision.

B. Whether the District Court was empowered to make a physical solution in this case and if so whether, where all parties including respondent Bureau of Reclamation officials asked the Court to make a physical solution, the present action is a suit against the United States. Whether an action to determine whether charges for water are unreasonable or in excess of the statutory authority of respondents to make is a judicial or administrative decision and if a judicial decision whether such action is a suit against the United States.

C. Assuming respondents can attack the decision of the District Court that any charge to the City of Fresno in excess of $3.50 per acre-foot for water, *although this point is not included in their petitions for certiorari*, whether respondents can include a profit in said charge in addition to repayment of allocable costs together with the interest charge to municipalities provided for in the Act of August 4, 1939, 53 Stat. 1187.

E. Whether the United States under the Act of July 10, 1952, 66 Stat. 518, has waived its immunity to suit in this case.

F. Whether following provision in Section 9c of the Act of 1939, Stat. is constitutional.

V.

STATEMENT OF THE CASE.

This case, No. 51 this term, involves two other related cases arising out of certiorari from the same decision of the Court below, namely cases No. 31 and No. 115 of this term. We again refer to our Statement of The Case in petitioner's opening brief, page 14 thereof. Petitioners make the same Statement of The Case we made in our opening brief in this case (No. 51, of this term).

Respondents state at page 5 of their answering brief in this case (No. 51, this term) "the present case primarily relates to certain ancillary relief sought by Fresno in connection with its alleged needs for an additional water supply for municipal purposes."[1]

---

[1]The present case also involves the riparian rights of landowners between Friant Dam and Gravelly Ford Canal and the overlying rights (which in California are the same as analogous to riparian rights), (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)), supplied by percolation from this area of the river. Respondents in their brief do not deny that the owners between Friant Dam and Gravelly Ford Canal are entitled to all necessary water apparently agreeing with the Court of Claims in *Wolfsen v. United States*, 162 F. Supp. 403 (1958): We quote:

> "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes:

As shown by exhibits I, II and III of our opening brief, the City of Fresno is located in the upper San Joaquin Valley. The United States has constructed or is in the process of constructing dams on every river in the upper San Joaquin Valley.

The City's sole source of supply for additional water is from Friant Dam.

The City of Fresno admittedly lies in both the county and watershed of origin of the San Joaquin River. Respondent Bureau of Reclamation officials do not contend that any respondent district served by the Friant-Kern Canal is in either the watershed or county of origin of the San Joaquin River.

The City of Fresno owns a municipal water works and pumps its entire supply from the underground. All parties admit that the City cannot safely pump more than 30,000 acre-feet annually from its underground. It is now pumping in excess of 60,000 acre-feet.

The City's engineers testified the City needs at least 150,000 acre-feet surface supply annually from the San Joaquin River. The respondent Bureau of Reclamation officials admit that the City needs at least 100,000 acre-feet annually, in addition to what it can

---

(1) *to satisfy riparian rights between Friant and Gravelly Ford; * * *.*" (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements."

Stoner Hearings before a Subcommittee on Public Lands, United States Senate, 80th Congress, S. 912, p. 708.

pump from the underground, in order to survive.[2] The respondent officials in 1960, after a protracted hearing before the California Water Rights Commission, contracted to sell the City of Fresno 60,000 acre-feet of Class I irrigation water (not municipal water) at $10.00 per acre-foot subject to decrease in price and increase in amount in accordance with the final decision in the Courts in this case. Even according to respondent Bureau of Reclamation officials own evidence, the City needs at least 40,000 acre-feet more water annually in order to survive. As shown in petitioner's opening brief, the additional 40,000 acre-feet could be obtained from the difference between actual seepage and estimated seepage from the Friant-Kern Canal.

The District Court held that the City of Fresno was entitled to have its needs supplied before any water was supplied to respondent districts from the Friant-Kern Canal (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)).

The District Court also held that any charge for Class I irrigation waters to petitioner City of Fresno in excess of $3.50 per acre-foot was unreasonable and in excess of the statutory authority of respondent Bureau officials.[3] (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)). Respondent officials in their petition for certiorari raised no issue on the correctness of this finding of the District Court.

There is no question that the respondent districts are getting more water than they need.[4]

---

[2]R. 1983.

[3]*Rank v. (Krug) United States*, 142 F. Supp. 1, 185 (1956).

[4]"With the exception of the Madera Irrigation District and

VI.

ARGUMENT.

A. Respondent Bureau of Reclamation Officials in Their Reply Brief Fail to Answer the Following Contentions of Petitioner.

Petitioner's arguments which respondent Bureau officials failed to answer are here listed with either a reference to the pages in petitioner's opening brief where authorities supporting said undisputed arguments are found or a brief quotation of authorities in support of said argument of petitioners is given.

1. The Determination of the Statutory Authority of Respondent Bureau of Reclamation Officials Is a Judicial and Not an Administrative Determination.

"* * *. The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus)

Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944).

Also see page 92 of petitioner's opening brief in Case No. 51, this term.

2. The Determination of Whether a Rate Charged for Water From a Reclamation Project Is Reasonable or Unreasonable, Arbitrary and in Excess of the Statutory Authority of Respondent Officials Is a Judicial and Not an Administrative Decision.

It is for the courts to determine whether a water rate charged for water out of a United States Reclamation Project is reasonable or unreasonable, arbitrary, capri-

---

Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the

cious or illegal. This is a judicial, not an administrative function.

> "* * *. The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus)
>
> *Stark v. Wickard*, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944);
>
> *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);
>
> *Yuma County Water Users' Ass'n v. Schlect*, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);
>
> *Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 Fed. 72 (8th Cir.) (1914).

It will be observed in all of the above cases, neither the United States nor the Secretary of the Interior was a party and that all of said actions were for the determination of the question of whether the water charges from a Bureau of Reclamation Project were legal or illegal. Other cases supporting petitioner's position are as follows:

> "12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)
>
> *Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that *some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands.*" (emphasis ours)

State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959, p. 74.

"The rights of the public are not to be ignored. It is alleged here that the rates precribed are unreasonable * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *. The public cannot properly be subjected to unreasonable rates * * *."

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896);

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 773 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional *one, either to protect the public against excessive or unreasonable charges*, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 693, 694.

3. By Virtue of Rule 40 (d) (2) of This Court Respondent Officials May Not Bring Up New Matters Not Set Forth in Their Petitions for Certiorari.

See Rule 40(d)(2) of this Court.

4. Having Failed to Attack as Error in Their Petition for Certiorari the Finding of the District Court That Any Charge to the City of Fresno in Excess of $3.50 Per Acre-Foot for Class I Irrigation Water Was Unreasonable, Respondents Are Barred From Attacking It Under Rule 40 (d) (2) of This Court.

"(2) The phrasing of the questions presented need not be identical with that set forth in the

jurisdictional statement or the petition for certiorari but the brief may not raise additional questions or change the substance of the questions already presented in those documents." (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, page 1439 (1958).

Moreover, the decision of the trial court on this issue should be affirmed unless clearly not sustained by the evidence. We point out just one part of the evidence. Petitioner's engineer, Charles H. Lee, testified that charges should not exceed $1.50 per acre-foot including interest.[5]

5. That Respondent Officials Are Required to Operate the Central Valley Project in Accordance With California County and Watershed of Origin Laws and by the Act of Congress of October 14, 1949, 63 Stat. 852, 853, Requiring Respondents to Recognize California County and Watershed of Origin Protective Laws.

This is one of the most important questions before this Court. We believe petitioner's position is conclusively sustained by the authorities cited at pages 137 to 151 inclusive of our opening brief in this case, No. 51 this term.[6]

---

[5]R. 295 (new Volume), Deft. Ex. A-79-A, Rep. Tr. 19,778.

[6]Respondent Bureau officials in Footnote 8 at page 26 of their answering brief in this case attempt to distinguish the Act of October 14, 1949, 63 Stat. 852, 853, by quoting only a limited part of that act and attempt to distinguish the act by saying it was adopted "at the suggestion of the Bureau of Reclamation, *Hearings, American River Basin Project, House Subcommittee on Irrigation and Reclamation*, 81st Cong., 1st Sess."

However, from the document of the Bureau given the Senate it was clear that the Bureau was referring to "all existing water rights" under the Central Valley Project and that their only

Moreover, the full quotation of the Act of October 14, 1949, 63 Stat. 852, 853, appears at page 16 of Appendix "C" of petitioner's opening brief in this case No. 51 which completely nullifies their contention that this act didn't apply to all features of the project and shows that this act was a complete reauthorization of the Central Valley Project as set forth in the act of August 26, 1937, 50 Stat. 844, 850.

Moreover, neither the Friant-Kern Canal nor the Delta-Mendota Canal were in operation at that time as alleged by respondents.

6. The County of Origin and Watershed of Origin Protective Rights May Not Be Taken by Eminent Domain.

Both the Act of October 14, 1949, 63 Stat. 852, 853, and the following opinion of the Attorney General of California clearly show that water to which California counties and area of origin are entitled may not be taken by eminent domain or condemnation.

> "The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely

---

approval was contained in their documentary report to Congress that they had "complied with California's county of origin legislation."

> "66. In addition to respecting all existing water rights, *the Bureau* in this report has complied with *California's county* of origin legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere." (emphasis ours)
>
> Senate Document 113, 81st Congress, page 65, Pltf. Ex. 136, R. 2285, Rep. Tr. 6,570.

destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General, page 21 (1955).

The efforts of respondent officials to put their plan of physical solution into force by contracts with some of the riparian owners between Friant Dam and Gravelly Ford Canal also negative any authorization by Congress to take these rights.

"* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part* of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit." (emphasis ours)

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

For additional authorities showing that county and watershed of origin rights cannot be taken by eminent domain, see pages 139 through 148 inclusive of petitioner's opening brief in this case No. 51 this term.

7. That Respondent Officials Are Required to Operate the Central Valley Project in Accordance With California Municipal and Domestic Priority Laws.

See pages 54 and 55 of petitioners' opening brief in this case No. 51 this term.

8. Assuming That Petitioner Was Entitled to Water From the Central Valley Project the Determination of the Amount of Water to Which a Riparian or Overlying Owner Is Entitled, Is a Judicial and Not an Administrative Decision.

It having been conclusively shown that both petitioner City of Fresno and the riparian owners between Friant Dam and Gravelly Ford Canal are entitled to have all necessary water reserved for them to supply their present and future needs and that said rights may not be taken by eminent domain, we submit the determination of the amount of water to which their rights entitle them is a judicial and not an administrative decision.

> "* * * what is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined *in the first instance by the Court.*" (emphasis ours)
>
> *Gin S. Chow v. City of Santa Barbara*, 217 C. 673, 706, 22 P. 2d 5 (1933).

B. The District Court Was Empowered to Make a Physical Solution in This Case.

We submit that this Court in approving the Court of Claims decision in *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950) approved court decrees of physical solution on streams of the Central Valley Project, and that it is the duty of appropriators of water such as the United States is in this case to pay for the same.

"* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is *obligatory that he find some physical solution, at his expense,* to preserve existing prior rights * * *.

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls., 1, 81, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

Such has also been the holding of the Court below on at least three occasions.[7]

---

[7] "*The matter of a physical solution* becomes a practical problem which will vary with each case. That practical problem is best stated by the question—how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights. If those prior vested water rights can be preserved and satisfied *by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California decisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes.* The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction *requiring a physical solution* have

It is further submitted that in view of words "that a physical solution be found" in the Court of Claims case quoted above that the plaintiff "had the right to demand that defendant (here the United States) provide a physical solution"; that either the United States was not an indispensable party as was held in *Rank v. Krug*, 90 F. Supp. 773 (1950), (cited with approval by this Court),[8] or that as Mr. Justice Douglas and Mr. Justice Black held in their opinion in the *Gerlach Live Stock Company case* that where the United States.

---

been to, as near as possible, satisfy the prior vested right whether riparian or *overlying*, and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights.'" (emphasis ours)

State v. Rank, 293 F. 2d 340, 344 (1961).

"9. The term 'physical solution' as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * * See: Peabody v. City of Vallejo, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; Rancho Santa Margarita v. Vail, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; City of Lodi v. East Bay Municipal Utility District 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439. See also *Rank v. Krug*, D.C.S.C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

"* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647, 662 (9th Cir.) (1956).

[8]"22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

as an appropriator, comes into a state and seeks to appropriate water (as it is doing in this case),[9] it waives its sovereign immunity under the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 389-390.[10]

Finally, it will be remembered that the Secretary of the Interior himself requested a physical solution.

> "The *defendant Bureau* of Reclamation officials filed a plan for a *physical solution* December 15, 1951. This plan is reflective in substantial detail of the principles which I have outlined thus far in this letter. The State of California, as an intervener in the case, also filed a plan for a physical solution, and the plaintiffs did likewise." (emphasis ours)
>
> R. 298 (new volume), Deft. Ex. A-79-A, Letter of Secretary of the Interior Douglas McKay to Hon. Herbert Brownell, Jr., Attorney General, Rep. Tr. 19,778.

---

[9]California Water Rights Board Decision No. D 935, adopted June 2, 1959.

[10]"Congress to be sure, has full power to relinquish its immunity from suit for the taking. See Ford & Son v. Little Falls Fibre Co., 280 U. S. 369, 377, 50 S. Ct. 140, 141, 74 L. Ed. 483; United States v. Realty Co., 163 U. S. 427, 440, 16 S. Ct. 1120, 1125, 41 L. Ed. 215. And I think *it has done so*—not by the Acts appropriating funds for the project but *by the Reclamation Act of 1902*, 32 Stat. 388, 43 U. S. C. 371 *et seq.* * * *.

"The Act applies solely to the 17 western States. It deals with reclamation projects as its title indicates. The Central Valley Project is such a project." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 757, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

C. A Suit to Enjoin Respondent Bureau of Reclamation Officials From Charging Unreasonable, Illegal and Arbitrary Rates to Municipalities for Central Project Water in Violation of the Acts of Congress Limiting Such Charges Is Not a Suit Against the United States.

The District Court held that the United States although a necessary party to the doing of complete relief in this case was not an indispensable party so far as obtaining relief against the respondent officials was concerned.

> "The United States is a *necessary* party to the doing of complete relief, though it would not be an *indispensable* party to the obtaining of relief only against the defendant officials." (emphasis ours)
>
> *Rank v. (Krug) United States,* 142 F. Supp. 1, 78 (1956).

The Court below partially affirmed this portion of the decision of the District Court, holding that the United States was not an indispensable party so far as the District Court's plan of physical solution was concerned, but was an indispensable party so far as obtaining water by the City was concerned. Neither Respondent officials, nor the court below however, cited one single authority backing this part of the decision of the Court below.

At page 94 of petitioner's opening brief in this action No. 51 (petitioners) cited decisions of this Court involving attempted illegal Bureau of Reclamation charges which held that the determination of whether bureau of reclamation charges contained illegal items is a judicial and not an administrative determination.

At page 98 of their brief, petitioners cited decisions of this Court and other federal Courts that an action to determine whether water rates attempted to be charged by Bureau of Reclamation officials are unreasonable, illegal or arbitrary is not a suit against the United States. We now briefly cite three decisions of this Court involving these two points and one of several decisions of the Court of Appeals holding that such a suit as this is not an action against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Assn. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

"* * *. The questions whether or not the charges alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them, from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a '*suit against the United States*', nor

is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n., 219 F. 72, 73 (8th Cir.) (1914).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, *against the local officials of the United States Bureau of Reclamation* in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. *Neither the Secretary of the Interior nor the United States was a party.* The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

"(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."

Baker v. Swigart, 196 F. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

"The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n. v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project *against "local officials* of the Yuma Project of the United States Reclamation Service." (*Yuma County Water Users' Ass'n. v. Schlecht,* 275 F. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

As shown in all of the above suits, the reasonableness and legality of water charges by Bureau of Reclamation officials under Reclamation Projects was decided *and in none of the above decisions of this Court was either the United States or the Secretary of a party.*

Nowhere in respondents' brief did respondents attempt to distinguish the above cases, nor do we believe they can distinguish them. Other decisions of this Court sustain petitioners.

> "* * *, but public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law *or in equity*, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)
>
> *Land v. Dollar*, 330 U. S. 731, 739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

> "Exemption of United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by his illegal action, officer cannot claim immunity from injunction process." (Syllabus)
>
> *Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, 413, 81 L. Ed. 525 (1937).

1. **Respondent Bureau of Reclamation Officials Are Attempting to and Are Illegally Making a Huge Profit From the Operation of the Central Valley Project and From Municipal Water Offered Petitioner City of Fresno, in Violation of the Acts of Congress Authorizing Reclamation Projects in General and the Central Valley Project in Particular.**

See pages 105 through 115 of petitioner's opening brief in Case No. 51, this term, which we incorporate by reference herein.

2. **Neither Is the Secretary of the Interior an Indispensable Party.**

At page 28 of respondent officials' brief, respondents make the claim that the Secretary of the Interior was an indispensable party.

In the first place, under the latest decision of this Court, the question of whether the head of an administration or administrative department residing in Washington is an indispensable party is a matter of *practical consideration.*

> "8. Federal Civil Procedure. Section 203. *Indispensability of parties may be determined on practical considerations.*
>
> "9. Declaratory Judgment. Section 304. Where joining Commissioner of Immigration and Naturalization as additional party defendant in alien's action against District Director of Immigration and Naturalization for District of New York *might result in compelling alien to go to District of Columbia in order to contest deportation in his action* for declaratory relief, Commissioner was not an indispensable party. Administrative Procedure

Act. Section 10, 12, 5 U.S.C.A. Section 1101 et seq." (Syllabus) (emphasis ours)

Shaughnessy v. Pedreiro, 349 U. S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955).

Here, based on "practical considerations" it would have been unjust and impossible to ask that attorneys for the farmers of moderate means, the attorneys for the fifteen respondent irrigation districts, attorneys for the State of California, the attorneys of the California Farm Bureau and other California cities who came into this case *amicus curiae* and the battery of high powered expert witnesses to go to Washington for a continuous period of eighteen months and attempt to try a case before a Washington judge not familiar with the local terrain and conditions. As this Court said in the case just cited.

In the second place the respondent California Regional Director, Boke, who was in complete charge of the Central Valley Project from 1944 to 1953, admitted that he had full authority to enter into whatever contracts he desired and on whatever terms for water from the Central Valley Project.[11]

---

[11] "From the evidence it appears that the dates of the contracts between the United States and the 15 Irrigation District defendants, together with the date of the factual report upon the feasibility of furnishing water to such districts, as well as the initial water delivery date, are as set forth in the following table:

	Contract	Factual Report	1st Del. of water
Delano-Earlimart	8/11/51	June, 1950	3/1/52
Exeter	11/8/50	Jan. 1950	3/23/51
Ivanhoe	9/23/50	Apr. 1949	3/20/50
Lindmore	2/29/49	June 1948	5/19/50
Lindsay-Strathmore	8/5/48	Jan. 1950	7/9/49
Lower Tule	5/1/51	Aug. 1950	3/1/52
Orange Cove	5/20/49	Aug. & Sept. 1947	

Boke who was California Regional Director of the Bureau of Reclamation was in office from 1944 to 1953 when all the respondent district contracts were executed.[12]

Moreover, this point has been decided by this Court where the legality and unreasonableness of water rates was determined against regional officials of the Bureau of Reclamation only.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922).

(a) *Respondents Authorities Do Not Sustain Their Positions.*

Finally the authorities cited by respondents do not sustain their position. At page 28 of respondent's

Porterville	1/28/52	July	1950	3/1/52
Saucelito	2/13/51	June	1950	3/24/51
S.S.J.M.U.D.	10/18/45	Feb. & Mar.	1948	
Stone Corrall	12/13/50	Jan.	1959	3/27/51
Terra Bella	10/12/50	Jan.	1950	4/13/51
Tulare	10/18/50	Feb.	1949	3/19/51
Chowchilla	7/5/50	Mar.	1950	3/22/51
Madera	5/14/51	Mar.	1950	3/1/52

Rank v. (Krug) United States, 142 F. Supp. 1, 137.

[12] "By Mr. Rowe: Q: You remember having lunch in Washington, on April 17, with Mr. Winton, sitting in the back of the room, and Mr. Earl Harris of Santa Cruz, do you not?

"A: Certainly.

"Q: *You made a statement at that time that you could do whatever you wanted in California, as far as contracting for water, setting up flows and releasing water from a dam, didn't you?*

"A: That is generally my responsibility, yes.

"Q: Yes, without appealing to any higher authority?

"A: Generally speaking, yes." (emphasis ours)

Testimony of Witness Richard L. Boke, Rep. Tr. August 21, 1951, pp. 559, 600.

brief in this case (No. 51, this term) respondents cite *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1948) and *Williams v. Fanning*, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 45 (1947). In the *Hynes* case the defendant was the regional director of fish and game in Alaska and in *Fanning v. Williams* the defendant was the local postmaster in Los Angeles. In neither case were their Washington superiors of the parties nor the United States parties.

D. The United States Under the Act of July 10, 1952, 66 Stat. 518, Has Waived Its Immunity to Suit in This Action.

Although we submit that a suit to enjoin regional officials of the United States Bureau of Reclamation is not a suit against the United States neither is the Secretary of the Interior an indispensable party to such a suit.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States

was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

> "(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."
>
> *Baker v. Swigart*, 196 F. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

> "The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."
>
> *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of the United States Reclamation Service" (*Yuma County Water Users' Ass'n v. Schlecht*, 275 F. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

> "* * * The questions whether or not the *charges* alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * *

are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, *is not a 'suit against the United States'*, nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 F. 72, 73 (8th Cir.) (1914).

Magruder was the local manager of the United States Bureau of Reclamation.

And although we feel that we have shown that the government has waived its immunity under the Act of June 17, 1902, 32 Stat. 388, 390 (See Appendix "C" page 6 of petitioner's opening brief in case No. 51), where the government either in a suit for damages or injunctive relief, enters a state and seeks to appropriate water, we submit that immunity of the United States was completely waived in this suit by the Act of July 10, 1952, 66 Stat. 516, 560 (See Appendix "C" page 17 of petitioner's opening brief in this case No. 51).

At page 2 of respondents' opening brief they refer to the Act of July 10, 1952, 66 Stat. 516 and say one of the questions presented is:

> "1. Whether Congress by consent to the joinder of United States in suits for general adjudication of all rights in a river system waived its sovereign immunity * * * for an order enjoining the operation of a federal reclamation project."
>
> Respondent Bureau Officials' Brief in Case No. 51, page 2.

In the first place respondents have added two words to the statutory language of the Act of July 10, 1952, 66 Stat. 560, namely the words "all" and "general" to their questions presented in an effort to imply the Act of July 10, 1952, requires a "general" adjudication of "all" rights, which it does not. The Act of July 10, 1952, refers to the "adjudication of rights to use of water of a river system *or other source*"—not to the "*general*" adjudication of "*all*" rights.

They also overlook the words "or other source" which can here by water from Friant Dam, none of which was to go below Gravelly Ford, and finally they completely ignore the second paragraph of section 208(a) of said Act which reads as follows:

> "Sec. 208.(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."
>
> Act of July 10, 1952, 66 Stat. 516, 560.

Here the United States is acquiring water rights by "appropriation",[13] by "purchase",[14] and "exchange".[15]

The major question presented by respondents in the above question (1) is whether the waiver of immunity under the Act of July 10, 1952, applied to injunction suits. It clearly does since the act applies to "any suit" which would cover both injunction and class action suits, and since the act clearly states the United States "shall be subject to the judgments, orders and decrees of the Court having jurisdiction * * * in the same manner and to the same extent as a private individual under like circumstances". Clearly an individual interfering with the original plaintiffs' rights would be subject to an "injunction". Likewise under the act the respondent Bureau of Reclamation officials or the government itself would be subject to an injunction.

Moreover, a study of the history of the Legislative Act of July 10, 1952, shows the Department of the Interior, in a letter asked the Congressional Committee to except *injunction* suits from the act.[16] *Congress*

---

[13]See City of Fresno Complaint in Intervention [R. 182-16] and Decision of California Water Rights Board No. D-935, adopted June 2, 1959, granting the United States rights to appropriate water of the San Joaquin River.

[14]Deft. Ex. A-48-A, Purchase Contract dated July 27, 1939.

[15]Deft. Ex. A-48-A, Exchange Contract dated July 27, 1939.

[16]"(c) *it should not extend to the granting of equitable relief* against the United States or to the entering of a judgment for costs against it; (d) *the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party.*"

Letter to Senator McCarron dated August 3, 1951, from Department of the Interior opposing S. 18, Page 8, Senate Report 755 dated September 17, 1951, 82nd Congress.

turned down this request as shown by the Act of July 2, 1952, 66 Stat. 560.

As stated "or other source" clearly covers Friant Dam with its three outlets — one to the Madera Canal —one to the Friant-Kern Canal and one into the river bed of the San Joaquin where the water from this other source was to flow down to Gravelly Ford Canal and then stop.

In the present case the United States has been added as a party, the respondent Bureau of Reclamation officials were added as parties, all fifteen respondent irrigation districts were parties and the plaintiffs represented in a class action (which clearly is included in the word "any" action) the 47 other riparian landowners who had not settled with the government (not the smaller number stated by respondents) between Friant and Gravelly Ford Canal who had not sold their rights to the United States Bureau of Reclamation — which rights were represented by the respondent officials and their able counsel. We request this Court to look at Deft. Ex. A-9-A-1. R. 2340. Rep. Tr. 13. 361. [As shown in our opening brief the Court below found that certain of the named plaintiffs had certain infinitesimal prescriptive and appropriative rights which the Deputy Attorney General said were "minimal" (See letter from Deputy Attorney General set forth as footnote 130 at page 126 of petitioner's opening brief in this case, No. 51 this term).]

De minimis is defined by Webster's New International Dictionary as follows:

> "de minimis * * * Law. The law takes no account of trifles; — a maxim applicable to cases

where it is impracticable for the law to adjust the rights of parties according to trifling changes or difficulties, as in case of alluvion in the change of a stream's banks, or parts of a day in the ordinary reckoning of time, etc."

Since these rights were therefore trifles and impossible for the Court to consider, this was not ground for reversal.

This Court has many times held that a trial court should not be reversed for immaterial or infinitesimal errors or for immaterial errors.

> "No judgment should be reversed in a court of error, when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was not made."
>
> *Lancaster v. Collins*, 115 U. S. 222; 6 S. Ct. 33, 29 L. Ed. 373 (1885).
>
> "We do not reverse cases for unsubstantial error. Abstract inerrancy is hardly possible in a trial * * * it is never essential to a valid trial."
>
> *Maryland Casualty Co. v. Reid*, 76 F. 2d 30 (5th Cir.) (1935);
>
> *Anchor Casualty Co. v. McGowan*, 168 F. 2d 323 (1948).

The District Court made a ruling on the water rights of each of the 217 parcels (See pages 130 through 134 inclusive of our opening brief in this case No. 51 this term).

1. The Court Below Also Erroneously Held That the Rights of the Named Plaintiffs and the Class They Represent Have Not Been Established as Between Themselves.

The Court below stated the following:

> "* * *, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 347-348 (1961).

Although it is submitted that *in a class action it is not necessary in the decision to state the rights of the various members of the class as between themselves*[17] —that being left for a separate proceeding—the District Court did however determine the rights of the claimants between themselves. The Court as shown by Finding 19, R. 708, 709 and Judgment 23 [R. 837] divided the waters of the San Joaquin River between Friant Dam and Gravelly Ford in accordance with the number of acres of each of the parties of particular crops growing on said acres and in accordance with an allowance for use of water for each acre of crop growing on said lands of the plaintiffs and their class.

The District Court therefore did determine the right to use of water as among themselves when it divides the waters between the owners in accordance with the

---

[17] "There is no question but that the amount recoverable by each possible claimant is different, both as to the basic figure of percentage of profit denied them and also as to amount of gasoline sold. This factor is not decisive of a class action.

Weeks v. Bareco Oil Co., 125 F. 2d 84, 91 (1941).

number of acres of particular crops growing on the lands of said owners.[18]

In fact the Court went so far as to divide the domestic use of water between the plaintiffs and the class they represent based upon the number of human beings located on each parcel of land.[19]

---

[18] "Finding 23. The court finds that the past, present and future use of the following amounts of water for (1) consumptive use, (2) crop irrigation requirements, (3) farm delivery requirements, (4) effective precipitations, and (5) irrigation efficiency %, within the boundaries of the lands set forth and described in Exhibit 3 hereof (The Lee Line), excepting the lands within Tranquillity Irrigation District, is a beneficial use for agricultural purposes of the water of said San Joaquin River by surface diversion or by pumping underground percolating waters from wells lying within the boundaries of Exhibit 3 of these findings (The Lee Line):

Crop	Consumptive use	Effective Precipitation Acre feet	Crop Irrigation requirement per acre	Farm Delivery requirement	Irrigation efficiency %
"Alfalfa	3.42	0.38	3.04	4.05	75
Irrigated pasture	3.75	0.38	3.37	5.20	65
Cotton	2.38	0.38	2.00	2.85	70
Irrigated hay and grain	1.22	0.38	0.84	1.10	75
Truck	2.30	0.38	1.92	2.85	65
Misc. field crops	1.60	0.38	1.22	1.75	70
Deciduous fruit	2.38	0.38	2.00	2.65	75
Citrus & Olives	2.11	0.38	1.73	2.30	75
Grapes	2.53	0.38	2.15	3.10	70
Rice				6.00 to 7.1	

Pre-irrigation by the application of water to land prior to planting is a beneficial use for these crops in addition to the amounts set forth herein."

R. 837, Judgment 23.

[19] "The Court further finds that any use of water by humans for drinking, bathing, household, household garden uses and for evaporative and refrigerated air conditioning and other domestic uses and for manufacturing and other municipal uses up to an annual average of 339 gallons per person per day, and the use of water without unnecessary waste for drinking or bathing by poultry, cattle and other animals is a beneficial use of either the sur

The Court further decreed the amount of water which could legally be used by Tranquillity Irrigation District, the City of Fresno and other owners of percolating water rights on the alluvial cone of the San Joaquin (Lee's Line, Exhibit II). In fact any parcel of land on the alluvial cone of the San Joaquin known as "Lee's Line." [R. 838-839.] Therefore, it is submitted that the Court below clearly was in error in its above ruling.

2. Even if We Consider This Suit to Involve the Whole San Joaquin River System From Its Source to Its Junction With the Sacramento and That There Must Be a General Adjudication of All These Rights as Claimed by Respondents, This Case Meets All Requirements of a Waiver of Immunity Under the Act of July 10, 1952, 66 Stat. 516, 560.

Even if we agree with the erroneous contention of respondents that the word "general" should be added just before the words "adjudication of rights to the use of water of a river system or other source" in the Act of July 10, 1952, this Court should still find the United States has waived its immunity since there has been such a general adjudication.

Petitioner City of Fresno in its complaint in intervention had asked for an adjudication in the District Court of the priority of petitioner City of Fresno's filings to appropriate water of the San Joaquin River over those of the United States [R. 182-1] (*Rank v. (Krug) United States*, 142 F. Supp. 1, 121 (1956)).

face waters of the San Joaquin River or of the underground percolating waters within the Lee Line as more particularly described in Exhibit 3 of these findings."

R. 775, Finding 26.

The District Court held that the State Administrative Agency must first pass on that and allowed them to do so. This agency, then the State Engineer, is now the California Water Rights Board.

After general advertising as required by Section 1300 to 1316 of the California Water Code and Section 712, Article 11 of the California Administrative Code by the California Water Rights Board, all parties to this action including the City of Fresno, the United States and every respondent irrigation district appeared before the State Water Rights Board. The State Water Rights Board in its opinion No. D-935, dated June 2, 1959, denied the application of the City of Fresno to appropriate water and granted those of the United States with certain reservations but made the whole decision subject to final decision *in this case*. Although by statute the United States could petition the California courts for a review of this decision (Sec. 1094.5 California Code of Civil Procedure; the *Temescal Case*, 44 C. 2d 90, 280 P. 2d 1 (1955)), it did not do so. The City of Fresno petitioned for a review but dismissed its application with prejudice. We submit then that the matter of the waiver of immunity of the United States and the jurisdiction of this Court over the United States is *res adjudicata* as against all parties. (*Goodspeed v. Great Western Power Co.*, 33 C. A. 2d 245.)

If there are any other owners of water rights or other parties who should be brought into this case—if any there be—they could easily be ordered brought into this case by this Court at this time. It would be extremely unfair and unjust after the huge expenditure of time and money in this case to dismiss this suit

against the United States and possibly start over again. As was stated by the Supreme Court in *Mullaney v. Anderson:*

> "* * *. To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration * * *."
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).
>
> "* * *. Rule 21 of F. R. C. P 28 U. S. C. A. authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative *at any stage of the action* and on such terms as are just.'" (emphasis ours)
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

Even though there are no other parties to join in this general adjudication if opposing counsel can state what other parties could be joined we submit we are entitled to join them.

3. Respondents' Authorities Distinguished.

Respondents quote and the Court below in support of its ruling that the United States has not waived its immunity to suit, quotes *Miller v. Jennings*, 243 F. 2d 157, 159 (5th Cir.) (1957), a decision with a dissenting opinion.

The above case is clearly distinguishable by the fact that only three irrigation districts were involved in that action and in which action the United States was a party—and of these one district, the largest, the Ele-

phant Butts Irrigation District, lying upstream from the other two districts, *was completely left out of the suit*, and all interested parties and every parcel of land were not represented as here nor was there any such proceeding after advertisment as we had before the Water Rights Board here. Moreover, the State of Texas was not a party to the suit as was the State of California in this case, which entered this suit stating "the state appears in its sovereign, governmental and proprietary capacities, in its own interest and for the protection of its own rights; also as *parens patriae*, in the interest of and for the protection of all its citizens, residents, land owners and water users and its agencies"[20] and asked a physical solution of the rights of all parties and of all its citizens and land owners.

Ogden River Water Users Association v. Weber Basin Conservation, 238 F. 936, cited by respondents is clearly distinguishable. In that case the Court was entirely unaware of the Act of July 10, 1952 waiving immunity of the United States—there was only one plaintiff on the entire stream involved and the following quotation from that case sustains our position.

> "However, if it appears from the allegations of the complaint, excluding conclusions of law and unwarranted inferences of fact, that the officer named as defendant is acting *beyond* his delegated power or if the authority purporting to confer power on him to act is unconstitutional or otherwise invalid then the action will lie. *The officer is not then*

[20]R. 88, State of California's Amended Complaint in Intervention.

validly performing the will of his sovereign. (emphasis ours)

Ogden River Water Users' Ass'n v. Weber Basin W. Cons., 238 F. 2d 936, 941.

Here we specifically point out that the respondents are illegally attempting to add a profit in their attempted charge to the City of Fresno in violation of the Act of Congress of August 4, 1939, 53 Stat. 1187, which expressly excludes any profit in charges to municipalities.

Neither is *Hudspeth County Conser. District No. 1 v. Robbins*, 213 F. 2d 425, in point. There was no general adjudication as here and the Act of July 10, 1952, 66 Stat. 516, was not involved.

E. Section 9(c) of the Act of August 4, 1939, 53 Stat. 1187, Should Be Declared Unconstitutional.

Although we have already shown that there is no shortage of water for irrigation purposes and that the question of the legality of the above act should not therefore be an issue nevertheless respondents attempt to make it an issue.[21] Therefore, we feel that this

[21] "With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 55 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands."

State of California Water Rights Board Decision No. D-935, Adopted June 2, 1959, p. 24.

Court should declare the following portion of Section 9(c) of the Act of 1939, (53 Stat. 1187) unconstitutional.

> "* * *. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*" (emphasis ours)

The reasons for this are that the *only* rivers in the area from which Fresno can obtain a surface supply are the San Joaquin, the Kings, the Tule, the Kaweah and the Kern. At the present time on each of these rivers, the United States has either completed a dam such as they have on the San Joaquin, Kings and Kern, or are now constructing dams on the other two streams, the Kaweah and the Tule. All of the waters on the Kings, Tule, Kaweah and Kern are being put to beneficial uses under prior rights *in counties and watersheds of origin in which Fresno is not situated.* The City of Fresno is located in the watershed and county of origin of the San Joaquin River only. It cannot take water from the counties of origin or watershed of the other remaining rivers in the San Joaquin Valley by any legal process. *It must obtain its supply from Friant Dam or be destroyed.*

Clearly the right of human beings in the county and watershed of origin to water to sustain their own existence is paramount over the transportation to other counties and watershed for secondary agricultural uses,

especially where we now have more than 50,000,000 acres of surplus agricultural land in production according to Secretary Freeman.

It is submitted that under the Fifth Amendment to the Constitution Congress itself has no power to destroy the lives of the citizens of our cities by taking water which they vitally need for secondary agricultural uses.

We feel that the words of former Justice Brandeis of this Court in his dissenting opinion in *U. S. v. Burleson* are particularly appropriate.

> "A law by which certain publishers were unreasonable or abritrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.
>
> "* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."
>
> *United States v. Burleson*, 255 U. S. 407, 41 S. Ct. 352, 65 L. Ed. 704 (1921).
>
> "* * * discriminatory legislation may be so arbitrary, injurious or unjustifiable as to be violating of the due process clause in the Fifth Amendment."
>
> 16A C. J. S. 587;
>
> *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

F. The Spurious "Feasibility Report" Contained in House Document 146, 84th Congress, 2nd Session, 1956 [Pltf. Ex. 139], Meant Nothing to Congress.

Respondents attempt of their brief to justify the charge of respondent Bureau of Reclamation officials of $10.00 per acre-foot for irrigation water to the City of Fresno by saying that the attention of Congress to such a charge had been called. It is submitted that respondents should not be allowed in accordance with the rules of this Court to present issues not set forth in their petition for certiorari.

> "(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari *but the brief may not raise additional questions or change the substance of the questions already presented in those documents.*" (emphasis ours)
>
> Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, page 1539 (1958).

Without waiving our objection that respondents did not mention this point in any petition for certiorari it may be stated, however, that there is no merit in respondents' argument that Congress had been influenced by the $10.00 charge mentioned in House Document 146, 80th Congress, 1st Session (1947); 1 Engle, Central Valley Project Documents (1956), House Document 418, 84th Congress, 2nd Session, 574. This document was an illegal attempt by Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Rich-

ard Boke as California Regional Director of the Bureau of Reclamation to illegally make a second feasibility report on the Central Valley Project. As will be observed from page 6 of said document, it purports to be a "feasibility report" on the Central Valley Project, California.

> "REPORT ON THE ENGINEERING FEASIBILITY, THE TOTAL ESTIMATED COSTS AND THE ALLOCATION AND PROBABLE REPAYMENT OF THESE COSTS, OF THE CENTRAL VALLEY PROJECT, CALIFORNIA"

However, it cannot legally be such a feasibility report because this Court in a decision rendered after Document 146 found that the only feasibility report on the Central Valley Project as required by the Act of December 5, 1924, 43 Stat. 672 at 702 (see Appendix D of our opening brief, page 9) is the feasibility report of December 2, 1935, signed by President Roosevelt.[22]

This spurious feasibility report was made by the Secretary of the Interior Krug, Commissioner Strauss and Regional Director Boke in House Document 146 in an

---

[22] "But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

abortive attempt to change the fundamentals of the Central Valley Project to a Congress at which by this time had lost all confidence in them and which Congress finally terminated the salaries of Boke and Strauss in an effort to force them from Government Service. As shown by the statement of Secretary Krug in 1947 made shortly after this report, Congress had lost confidence in these gentlemen.

> "At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *.'" (emphasis ours)
>
> Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

We are not attempting to criticize Boke, Strauss or Krug personally. They no doubt were all fine men but they were not qualified to hold their jobs. Congress had lost all confidence in any of them or their reports and when this so called feasibility report was issued, Congress attempted to remove them from office so that the City of Fresno and others could get fair treatment under the Central Valley Project and what is more important as shown by the fact that Congress did not amend the Act of August 4, 1939, 53 Stat. 1187, Congress rejected the efforts of these gentlemen to illegally add a profit to

the authorized charges to municipalities providing for repayment of costs together with an interest charge not to exceed three per cent.

The following statement made by the late California Senator Downey, to whom the original plaintiffs and the City of Fresno had appealed in their efforts to obtain water, is indicative of the lack of regard of Congress for Secretary of the Interior Krug at the time respondents claim Congress had seriously considered the spurious "Feasibility Report of 1946":

> "Senator Downey. Secretary Krug: What part does he play in the Central Valley drama—this tragedy, comedy or farce—however you may wish to describe it? When Mr. Krug was brought to the exalter office he now holds, I thought order would succeed chaos in the Central Valley. Instead, I think with the bard that 'confusion now hath made his masterpiece'."
>
> Investigation, Bureau of Reclamation, Committee on Expenditures, Executive Department, 80th Congress, 2nd Session, page 140.

So far as Mr. Strauss was concerned, the following statement appearing in the Congressional investigation of Mr. Strauss is particularly pertinent as showing no credence was given to him on the recommended rates for water.

> "Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization

under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked, * * *."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 699.

"Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the idealogist who lives by the manipulation of propaganda, freely dispatched at public cost; * * *."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 140.

The following finding by the Congressional Committee showed what Congress thought of Mr. Boke.

"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 10.

This distrust of Congress for Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Regional Director Boke due to their actions in attempting to misrepresent their actions in the Central Valley Project to Congress and their illegal attempts to charge illegal municipal water rates and to deprive petitioner City of Fresno and others in the watershed and county of origin of the Central Valley Project of water finally resulted in Congress attempting to get rid of these gentlemen by cutting off the salary of at least two of them.

> "* * * Pursuant to the Harness Committee report, the Same Congress adopted in the Interior Department Appropriation Act for 1949 the so-called 'Strauss-Boke Rider.' This act (Public Law 841, 80th Cong.; 62 Stat. 1112) * * *:
>
> "(*Provided further,* that after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner and Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"
>
> Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, pages 684, 685.

The congressional statute was applicable to both Boke and Strauss.

> "The rider on the 1949 appropriation bill was applicable to both the Commissioner and the Re-

gional Director in California, neither of whom was a professional engineer."

Central Valley Project Documents, Part 2, Operating Documents, House Document 146, 85th Congress, 1st Session, page 685.

Clearly then the question of a fraudulent and illegal socalled Feasibility Report in which a rate of $10.00 is mentioned for municipal water had little or no effect on the Acts of Congress.

Even if Congress had considered it they never made any effort to amend the Act of August 4, 1939, 53 Stat. 1187, 1194, the Act of June 17, 1902, 32 Stat. 388, nor the Act of July 2, 1956, 70 Stat. 483, 484, which clearly limited water charges to municipalities to repayment of cost plus interest not to exceed 3% and upon which acts the District Court made its determination that any charge to the City of Fresno in excess of $3.50 per acre-feet was unreasonable and illegal.

Moreover, as stated, respondents having failed to meet the issues set forth in the petitions for certiorari filed by the various parties *should not be allowed to raise issues which they did not raise in their petitions for certiorari*, and we therefore submit that clearly the finding of the District Court that any charge in excess of $3.50 per acre-foot to the City of Fresno was unreasonable, arbitrary and illegal and in excess of the statutory authority of respondent must stand, irrespective of House Document 146.

VII.
CONCLUSION.

It is again submitted that the maintenance of this suit is to protect the very life and existence of the City of Fresno, the riparian owners between Friant Dam and Gravelly Ford Canal and the underground percolation water supply of 100,000 acres of valuable land, the majority of which lies in the county producing the greatest volume of agricultural products in the world, and that this Court has said no apology need be made for this litigation involving the Central Valley Project of California.

> "* * *. There have at times been differences, but these are inevitable in the every day implementation of such a giant undertaking."
>
> *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 279-280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958).

As to the relief sought we pray as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District Court in its decisions in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

(a) Reverse the holding of the Court below that respondent Bureau of Reclamation officials can

take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that respondent Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of petitioner City of Fresno. said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of respondent Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary, capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by respondent Bureau officials to the City of Fresno in excess of $3.50 per acre-foot (Class 1 irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of respondent Bureau officials is an administrative and not a judicial determination and that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water

out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of respondent officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that respondent districts should be relieved of the injunction the District Court imposed on the districts and respondent Bureau officials and sustain the holding of the Court below refusing to dismiss the respondent districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that respondent Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclamation projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed 3½ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), that any charge to the City of Fresno for water out of the Central Valley Project which has no municipal or domestic priority such as has been offered to the City of Fresno at rates greater than Class 1 irrigation rates ($3.50 per acre-foot) is unreasonable since no point on designation on

points on appeal was made by any respondent and since no point was raised by any respondent on this point in any petition for certiorari in this Court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Respondent officials are required to carry out by virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs.

In closing we particularly ask that this Court rule (1) that the City of Fresno is entitled to at least 100,000 acre-feet of water out of the Central Valley Project being the amount the petitioners' engineers testified was the minimum needs of the City of Fresno (which amount would now be 40,000 acre-feet in addition to the 60,000 acre-feet contracted to be sold by the Bureau of Reclamation to the City of Fresno at the close of trial of the above-entitled case); (2) that this Court affirm the decision of the District Court and overrule the Court below and decree the price the City should pay for water should not exceed $3.50 per acre-foot; and (3) hold that the owners of riparian and overlying percolating water rights between Friant Dam and Gra-

velly Ford may not have their rights taken by either eminent domain or condemnation on the grounds that they be in the Watershed and County of origin of the San Joaquin River, that Congress prohibited the taking of these rights and that at no time did petitioners intend to take these rights by eminent domain.

Respectfully submitted,

JOHN H. LAUTEN,
CLAUDE L. ROWE,
Attorneys for Petitioner, City of Fresno.

Dated: December 31, 1962.